Supreme Court of the United States

October Term, 1940.

No. 185.

PENNSYLVANIA-READING SEASHORE LINES,
Petitioner,

v.

HILDEGARDE CAWMAN, Administratrix of the Estate of JOHN W. CAWMAN, deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Your respondent, Hildegarde Cawman, administratrix of the Estate of John W. Cawman, deceased, respectfully opposes the application of the petitioner for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit (No. 126) entered on March 27, 1940 (R. 211), reversing a judgment of the United States District Court for the District of New Jersey, entered upon a directed verdict in favor of the petitioner (R. 188) upon the following grounds:

1. The judgment sought to be reviewed is not a final one and there are no extraordinary circumstances present in the case which warrant the issuance of the writ of certiorari to the petitioner.

2. The Circuit Court of Appeals in reversing the judgment of the District Court did not decide a Federal question in conflict with the applicable decisions of this Court.

3. It is a factual question for submission to a trial jury whether or not the petitioning carrier provided the respondent's intestate with a safe place to work in accordance with the conceded obligation which it owed to him.

STATEMENT OF THE CASE.

The respondent's intestate, John W. Cawman, was employed as a freight brakeman by the petitioner. On January 3rd, 1935, while engaged in his regular duties as a rear brakeman or flagman, he was riding in the caboose on the rear end of petitioner's freight train, No. P.P. 802, and traveling from Pavonia, New Jersey, to West Philadelphia, Pennsylvania. After crossing the Delair Bridge from New Jersey, the said train was proceeding westwardly along the tracks of the Pennsylvania Railroad in Philadelphia, Pennsylvania. It stopped at a signal shortly before coming to the Frankford Junction of the said railroad. When it had thus stopped, the caboose in which the respondent's intestate was riding was standing upon an unguarded trestle over Aramingo Street and known as the Aramingo or Memphis Street Bridge. This trestle was wide enough to accommodate two tracks with a footpath in the middle between the two tracks. The outer sides of this trestle

or bridge had no footpath, no handrail or any other guard to protect employees from falling (R. 202 to 205).

When the train in question came to a stop, it thereupon became the decedent's duty, in accordance with the rules of the petitioning carrier, to immediately alight from the caboose and proceed back a sufficient distance from the rear of his train, so that he could properly signal any oncoming trains to stop. The steps of the caboose as it stopped on the trestle, extended beyond the edge of the northerly side of the said trestle. The rules and regulations of the petitioner required the decedent to carry with him, as he alighted from his train, a red signal lantern, a white signal lantern, and several signalling devices known as torpedoes and fusees.

The night in question was very dark and cold. There were no lights at or near the trestle bridge over Aramingo Street to apprise the respondent's intestate, as he alighted from the caboose or prior thereto, that the caboose had stopped on the unprotected and unguarded bridge trestle. In accordance with the rules and regulations of the petitioner, and the approved custom among railroad men, the decedent was required to alight backwards from the caboose holding the grab-iron of the caboose. When the decedent stepped from the caboose, instead of landing on the ground, he stepped into empty space and crashed to the street approximately eighty (80) feet below the trestle, and was fatally injured.

The train on which the decedent was working had stopped at the signal east of Frankford Junction to permit another train, which was ahead of the decedent's train, to cross over from the westbound track to the adjoining eastbound track and then to proceed eastwardly along the track immediately adjacent to where the decedent's train had stopped. The rules and regulations of the railroad ordi-

narily require a rear flagman, when alighting from a train, to alight on the right-hand side thereof. This rule is especially obligatory when there is a train approaching on an adjacent track, which is the fact in this case.

When the "proceed signal" was displayed to the decedent's train, the other members of the crew became aware that the decedent did not respond to the engineer's signal to return. They started to look for him. They found him on the ground eighty (80) feet below the trestle. According to the various witnesses, the decedent's body was located at a distance from four (4) to twenty (20) feet east of the west embankment. He was unconscious. He made no statement at any time. He died the next day in the Frankford Hospital. He left surviving him a widow and a son. The son was not dependent upon him for support, but the widow, however, was.

The respondent endeavored on several occasions during the trial of this cause to introduce evidence that the petitioner had failed to provide the respondent's intestate with a safe place to work. The trial Court refused to admit the testimony (R. 58). The respondent also attempted to show by expert testimony and other testimony the kinds and types of bridges which were used and the ordinary safeguards which were provided by the petitioning railroad and other railroads for bridges of a similar kind in similar situations and places. The trial Court also refused to receive this testimony (R. 70 to 73). The trial record contains voluminous testimony concerning the unsafe construction of the bridge, the lack of guards, lights, etc. In fact, the Circuit Court of Appeals in commenting on this point in its opinion stated that "In the case at bar, there is such mention and in, so to speak, full bodied terms."

The widow, who is the respondent in the present proceeding, states that the decedent turned over his entire

salary to her. His average earnings were approximately Two Thousand Dollars ($2,000.00), a year. She further testified that prior to his death, he had continuously enjoyed good health. The decedent was fifty-one (51) years of age, when he was killed. He was about five (5) feet, eight (8) inches tall and weighed about one hundred and ninety (190) pounds. He had been working for the petitioner for twenty-eight (28) years.

The issue came to trial before the Honorable John Boyd Avis and a jury on November 1, 1938, in the United States District Court for the District of New Jersey, at Camden, New Jersey. Testimony was offered at the trial in behalf of the respondent, and also in behalf of the petitioner. At the conclusion of the respondent's direct testimony, the petitioner moved for a directed verdict, which the trial Judge refused. After both sides had rested, the petitioner again moved for a directed verdict. The Court granted this motion and directed the jury to find a verdict of no cause for action in favor of the petitioner. The respondent thereupon appealed from the judgment that was entered against her by the jury at the direction of the trial Court to the Circuit Court of Appeals for the Third Circuit.

The Circuit Court of Appeals by its decision reversing the trial Court, did not take issue with the ruling of the trial Court with respect to the application of *B. & O. R. R. v. Berry,* 286 U. S. 272. As a matter of fact, the appellate tribunal held that the decision in *B. & O. R. R. v. Berry* had been properly applied by the trial Court, and based its judgment of reversal on the ground that the failure or compliance of the petitioner to provide respondent's intestate with a safe place to work was a question properly for the consideration of the jury and not of the trial Court. It was for this reason alone that a new trial was granted.

QUESTIONS.

The petitioner's questions are not presented by the facts in this case and are therefore moot. If any question is presented under the facts in the case at bar, it is, "Shall your Honorable Court issue a Writ of Certiorari to review an order which is not a final judgment, but merely an order granting a new trial?"

ARGUMENT.

I. The Court will not, except in extraordinary cases, issue a writ of certiorari until final decree.

The respondent respectfully suggests that in the present case the only issues involved are questions of fact and not of law. The law in reference to the obligation of the master to provide a safe place for the servant to work has been definitely settled both by statute and by judicial decision.

Boal v. Electric Storage Battery Co. (98 Federal 2nd 815);

Reading Company v. Geary (47 Federal 2nd 142).

The United States Circuit Court of Appeals for the Third Circuit granted the respondent a new trial on the ground that the case was one for the consideration of the jury, and in its opinion said (R. 214 to 215):

> "The, what by way of contract we may call, passive facts tell another story. The theory of the Berry case is negligence of personnel. There is no mention in

either opinion of failure of material. In the case at bar, there is such mention and in, so to speak, full bodied terms. The trestle from which the plaintiff's intestate fell was that and nothing more. There was no light, guard rail, or catwalk for the protection of those whose duties might require their physical presence on the non-existent flooring. We think (fol. 216) this omission may constitute a breach of the conceded obligation to provide a safe place to work. The cases are collected in 45 U. S. C. A. Sec. 51, note 289, p. 185 (1939 Supp.) p. 49. That obligation assumes as many forms as there are places to work. The citation of authority, except by way of analogy, is not, therefore, profitable. Plaintiff-appellant calls attention to one such analogy, the telltales before low bridges and tunnels. Later cases than those in his brief are Davis v. Crane, 12 F. (2d) 355, 356; Reading Co. v. Geary, 47 F. (2d) 142. There are other pertinent circumstances. See 45 U. S. C. A. Sec. 51, note 305, p. 195 (1939 Supp.), p. 54; note 306, p. 196 (1939 Supp.), p. 54; note 525, p. 291 (1939 Supp.), p. 88. The provision of mechanical safeguards is more simple than the employment of careful employees. Men are more fallible than machines: one lantern or a few boards and a man's life is saved.

"The failure or compliance in this aspect was not presented to the United States Supreme Court in Baltimore & O. R. Co. v. Berry, 286 U. S. 272. We believe it properly for the consideration of a jury and not of a court."

No final decree or judgment has been entered in the present case, and your respondent respectfully urges that the petitioner is not entitled to a writ of certiorari to review

the decision of the United States Circuit Court of Appeals for the Third Circuit, which, in effect, is an interlocutory order in the cause.

In the case of *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U. S. 251, at 258, this Honorable Court in delivering its opinion, said:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision * * * and except in extraordinary cases, the writ is not issued until final decree. * * * The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application: * * *."

In the case of *American Construction Co. v. Jacksonville, Tampa & Key West Railway Co.*, 148 U. S. 372 at 384, this Honorable Court stated:

> "Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

The decision of the Circuit Court of Appeals for the Third Circuit in the case at bar has the effect of being an interlocutory order in the cause and not a final judgment, and there are not present any extraordinary circumstances which justify this Honorable Court to exercise its sound judicial discretion, so that a writ of certiorari may be allowed the petitioner.

II. The Circuit Court of Appeals in reversing the judgment of the District Court in favor of the petitioner did not decide a Federal question in a way probably in conflict with the applicable decisions of this Court as to call for an exercise of this Court's power of supervision.

The opinion of the Circuit Court of Appeals (110 Fed. 2nd, 832), was in accord with the trial Court's application of the rule as to negligence of personnel as enunciated in the case of *Berry v. B. & O. R. R.* (286 U. S. 272). The opinion of the Circuit Court of Appeals, however, points out the fact that a new trial was granted the respondent, because it was a question of fact for the jury to determine whether or not the respondent's intestate was provided with a safe place to work by the petitioner. In this respect, the Circuit Court of Appeals distinguishes the Berry case from the instant case by pointing out that the theory of the Berry case is negligence of personnel, and further, that the trial Judge in the case at bar erred in not presenting to the jury for its consideration and determination the factual question as to whether or not the petitioner had provided the respondent's intestate with a safe place to work.

The following excerpts from the opinion of the Circuit Court of Appeals indicate the basis on which that tribunal distinguished the present case from the Berry case, *supra* (R. 214).

> "The, what by way of contract we may call, passive facts tell another story. The theory of the Berry case is negligence of personnel. There is no mention in either opinion of failure of material. * * * The failure or compliance in this aspect was not presented to the

United States Supreme Court in Baltimore & O. R. Co. v. Berry, 286 U. S. 272. We believe it properly for the consideration of a jury and not of a court."

The terms and provisions of Rule 38, Sec. 5 (b) of the United States Supreme Court provide that a writ of certiorari is not a matter of right but of sound judicial discretion and will only be granted where there are special and important reasons therefor. Among the reasons indicated in the rule for the allowance of the said writ is the situation where a Circuit Court of Appeals has rendered a decision deciding an important Federal question in a way probably in conflict with the applicable decisions of this Court. The decision of the Circuit Court of Appeals in the case at bar is not in conflict with the applicable decisions of this Court. It is respectfully urged that there are neither special nor important reasons therefore justifying the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals.

III. The petitioner was required to construct or maintain the trestle where the respondent's intestate was killed with reasonable or ordinary care having regard to circumstances.

In regard to the question as to whether or not the petitioner had furnished the respondent's intestate with a safe place to work, the respondent offered testimony at the trial and endeavored to show that the petitioner had not so constructed or maintained its trestle. The respondent further attempted to offer evidence to show that the bridge or trestle was not suitable or appropriate for the purpose for which it was maintained. A further offer of proof was

made to show that there was in use by the petitioner and other carriers means for the protection or maintenance of the said trestle which involved less danger to the men employed at that point. All of these offers were rejected by the trial Court.

IV. The respondent's intestate did not voluntarily assume the risk which resulted in his death.

In regard to this question, it might be stated that the trial Judge in directing a verdict in favor of the petitioner based his decision solely upon the case of *Berry v. B. & O. R. R., supra*, rather than on the question of the voluntary assumption of the risk by the respondent's intestate.

It is well settled that where one is employed, as the respondent's intestate, he assumes only the ordinary risks normally incident to the work in which he is voluntarily engaged. The decedent did not assume other extraordinary risks, nor such risks as may be due to the negligence of the petitioner, unless the risks resulting from such negligence are so well known and obvious to the decedent or are so plainly observable that he may be presumed to know of them.

> "In a clear case, the question of assumption of a risk by an employee is one of law for the Court, but where there is doubt as to the facts or as to the inferences to be drawn from them, it becomes a question for the jury. To preclude a recovery on that ground, it must appear that the employee knew and appreciated, or should have known and appreciated the danger to which he was exposed, and in case of doubt, that is for the jury * * * The burden of proof as to the assumption of risk is upon the defendant, and

where there is any doubt as to the facts or inference to be drawn from them, the question is for the jury." (*Cobia v. Atlantic R. R. Co.*, 125 S. E. 18, at page 21.)

In the case of *Marland v. P. & R. Ry. Co.* (246 Fed. 91), it was held to be a question for the jury to decide whether the railroad gave proper notice to its employees of the existence of an overhead bridge. It likewise is a question of fact for the jury to decide whether respondent's intestate received proper notice, if any, of the existence of the trap that confronted him on the trestle bridge where he was killed.

The rule of assumption of risk has likewise been well stated by Mr. Chief Justice Fuller in the case of *Un. Pac. Ry. Co. v. O'Brien* (161 U. S. 451 at 457), when he stated:

> "The general rule undoubtedly is that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if from a defective construction thereof an injury happen to one of its servants the company is liable for the injury sustained. The servant undertakes the risks of the employment as far as they spring from defects incident to the service, but he does not take the risks of the negligence of the master himself. The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, but it is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track and other structures. * * *"

The petitioner urges that negligence on its part may not be inferred under the employer's liability act from the mere existence of danger to the employee, or from the fact that the respondent's intestate was injured while in the

employment of the railroad. It is the respondent's position that she is entitled to show by competent evidence that the petitioner failed to provide her intestate with a safe place to work and that such proof may be offered by showing that the petitioner failed to use reasonable care in constructing and maintaining the trestle in question.

V. The negligence of the respondent's intestate would not bar recovery.

It has been decided in a long line of cases that the contributory negligence of the respondent's intestate cannot bar recovery for an injury sustained and for which damages are sought under the Federal Employers' Liability Act. Contributory negligence is a factor for a jury to consider in assessing damages against the petitioner. If the jury is satisfied that the employee has been contributorily negligent, the damages awarded should be diminished accordingly. This is a question which can be properly and appropriately controlled by the trial Court in his instructions to the jury. It is not a matter of law to be decided by the trial Court on a motion, nor by this Court on appeal.

CONCLUSION.

In conclusion, your respondent respectfully urges that there is no new, uncertain or complex question of law or practice presented in this case. If a writ of certiorari is granted to the petitioner, a precedent will be established wherein all dissatisfied litigants may apply for such a writ of review after a Circuit Court of Appeals has decided a case adversely to their interest. The matter involved

between the parties hereto is a matter of private right and is important to them only. No question of either public interest or public policy is involved.

Wherefore, your respondent respectfully asks that the prayer of the petitioner for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit be denied.

Respectfully submitted:

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